IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915. 1916

No. 66

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET, AND BRIEF IN SUPPORT OF MOTIONS.

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,
Counsel for Defendant in Error.

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CITATIONS.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914.

No. 824.

LOUISVILLE & NASHVILLE RAILROAD COMPANY,
PLAINTIFF IN ERROR,

vs.

OHIO VALLEY TIE COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF KENTUCKY.

MOTION TO DISMISS WRIT OF ERROR OR TO AFFIRM OR TO TRANSFER TO THE SUMMARY DOCKET.

Now comes the defendant in error, Ohio Valley Tie Company, by its attorneys of record herein, and moves this honorable court:

First. To dismiss the writ of error herein, on the ground that this court has no jurisdiction thereof, no Federal question being involved therein.

Second. To affirm the judgment of the Court of Appeals of Kentucky, on the ground that it is manifest that this writ of error was taken for delay only, and that the questions upon which the decision in this cause depends are so frivolous as to need little or no argument.

Third. To transfer this cause for hearing to the summary docket, if this court should refuse to dismiss or to affirm, because the cause is of such a character as not to justify extended argument.

JOHN BRYCE BASKIN,
EDWARD W. HINES,
J. V. NORMAN,
All of Louisville, Ky.,
Attorneys of Record for Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR IN SUPPORT OF MOTIONS.

Statement of the Case.

This is a writ of error to the Court of Appeals of Kentucky to review a judgment of that court affirming a judgment of the Jefferson Circuit Court at Louisville, Ky., for $56,971.56, based upon a verdict of a jury for that amount. The action was brought by the Ohio Valley Tie Company, the defendant in error, against the Louisville & Nashville Railroad Company, the plaintiff in error, to recover damages for injury to the plaintiff's business, which was that of buying, selling, and shipping railroad cross-ties. For convenience the defendant in error will be referred to throughout this brief as the plaintiff and the plaintiff in error as the defendant. The plaintiff alleged that the damages claimed resulted from a combination of acts committed willfully and maliciously for the purpose of injuring the plaintiff's business and driving plaintiff from the market as a buyer of cross-ties in competition with defendant. The jury stated in its verdict that it awarded $50,000 on account of injury to business, $5,000 for injury to cross-ties, and the remainder for expenses incurred by reason of the wrongful acts.

The jury was permitted by the trial court to consider, in arriving at their verdict, four acts of the defendant, committed willfully and maliciously and with the intent to injure plaintiff's business and to prevent it from buying ties along the line of defendant's right of way, to wit:

1. Maintaining excessive and unreasonable rates condemned by an order of the Interstate Commerce Commission on April 8, 1912, pursuant to complaint by the plaintiff.

2. Failing and refusing to furnish cars requested by plaintiff for shipment of its ties, when it might, by the exercise of proper diligence, have so furnished cars for said shipments without interference with the rights of others.

3. Discriminating against the plaintiff by refusing to accept the cars of another carrier which plaintiff tendered for shipment of its ties when the defendant's own cars were not available, and when defendant was accustomed to accept the cars of other carriers when tendered by other shippers under substantially similar circumstances and conditions.

4. Discriminating against the plaintiff by requiring it to transfer and unload cars arriving over defendant's line at Louisville and refusing to allow such cars to go forward on connecting lines, while permitting the shipments of other persons to go forward in its cars on connecting lines under substantially similar circumstances and conditions.

Of these acts the first relates solely to interstate shipments and the others to both interstate and intrastate shipments.

The rates referred to were proportional rates applicable only to shipments to Louisville for points beyond in other States. The Railroad Commission of Kentucky, by a general order made so far back as the year 1905, had prohibited the railroads from charging higher rates on intrastate shipments of cross-ties than they charged on such shipments of lumber, and the Interstate Commerce Commission, beginning almost with its organization, had repeatedly held that rates on ties ought not to exceed the rates on the kinds of lumber from which they were made (Record, p. 90). The defendant, although it knew from experience that it would be compelled in the end to pay back to the plaintiff in each case the excess over the lumber rate, continued to publish rates on ties which greatly exceeded the lumber rates, and this it did, as the jury found, for the willful and malicious

purpose of tying up the plaintiff's capital and injuring its business, the carrier having almost $20,000 of the plaintiff's capital tied up in that way at one time. At the time this action was instituted there was pending before the Interstate Commerce Commission a complaint by which the plaintiff attacked the proportional rates on cross-ties from points in Kentucky and Tennessee to Louisville "for beyond" and sought reparation in the sum of $6,198 on account of extortionate charges collected in the past on 91 carloads of ties to which those rates applied. Pending this action the Interstate Commerce Commission found the rates complained of to be unreasonable to the extent they exceeded the lumber rates and awarded reparation. The plaintiff then filed an amended petition setting up the fact that the Interstate Commerce Commission had condemned the rates so found to be unreasonable, and alleging that those were the rates referred to in the petition. The defendant filed a special demurrer to two parts of the original petition: (1) to so much of the petition as complained of the alleged excessive charges on 89 cars of cross-ties, because it appeared from the petition that another action was pending in the same court between plaintiff and defendant, seeking to recover for the same alleged wrong, and (2) also to so much of the petition as complained of defendant's alleged wrong in charging unreasonable rates on interstate shipments of cross-ties because under the act of Congress entitled "An Act to Regulate Commerce," approved February 4, 1887, and its various amendments, the only tribunal having any power or right to give redress for such alleged wrongs is the Interstate Commerce Commission. The rates on the 89 cars of ties involved in the other action in the State court, the pendency of which was pleaded in abatement, were finally excluded from the consideration of the jury (Rec., p. 61), and need not be considered here.

The carrier pleaded in abatement the pendency of the other action in the State court, but it did not plead in abate-

ment the pendency of the proceeding before the Interstate Commerce Commission. The defendant insisted, however, in the Court of Appeals of Kentucky that it was the duty of plaintiff to elect whether it would go to the Interstate Commerce Commission for its damages or would go to the courts, and that having elected to go to the Commission for damages it was compelled to claim all its damages before the Commission. To this contention the court made answer as follows:

> "We do not believe this position is tenable for three reasons: (1) This objection should come by way of a plea in abatement; and (2) the Interstate Commerce Commission as to damages is not a court, but its finding in that regard is evidential merely—neither binding nor conclusive; and (3) the instructions of the court prevent an allowance of anything for excess freight or any damage by reason of the act of charging excess fares."

Not only did the defendant fail to ask either by a plea in abatement or by a motion to that effect that plaintiff be required to elect whether it would prosecute its claim for reparation before the Interstate Commerce Commission or its claim for extraordinary or general damages in this action, but the special demurrer which it filed clearly negatived any intention to ask that such an election be made as that motion denied the right to elect. After the plaintiff filed its amended petition setting up the fact that the Interstate Commerce Commission had condemned the rates and had awarded reparation for the difference between the rates charged and the rates found to be reasonable, the defendant made a motion to strike certain allegations from the amended petition, but it did not include in that motion the allegations relating to the willful and malicious publication and maintenance of unreasonable rates (Rec., p. 30). The defendant then filed a general demurrer, but that demurrer under the Kentucky practice raised only the question as to the sufficiency of the

petition as a whole (Civil Code of Practice, secs. 92, 93), and it has never at any time been contended by counsel for defendant that the petition as a whole did not state a good cause of action.

Not only did defendant fail to rely in any way upon the pendency of the proceeding before the Interstate Commerce Commission or upon the order of reparation made by the Commission as a defense, but it clearly indicated its intention not to do so, not only by the special demurrer to the original petition, but by motions made during the trial.

We ask the attention of the court to defendant's "motions to exclude testimony" offered at the close of plaintiff's testimony. By these motions the defendant asked that all testimony as to the charging of unreasonable rates and the damages resulting therefrom be excluded from the jury because the sole right and jurisdiction to determine the reasonableness of the rates and the amount of damage done to a shipper by reason of the charging of an unreasonable rate was in the Interstate Commerce Commission (Rec., pp. 176-177). There was no suggestion in that motion that the jurisdiction of the Interstate Commerce Commission had been exhausted, but rather an invitation to plaintiff to go to the Commission for additional damages, thus clearly waiving any claim that there could be no further recovery because the Commission had already awarded to plaintiff all the damages to which it was entitled.

We also ask the attention of the court to the following excerpt from the bill of exceptions as to the instructions offered by defendant (Rec., pp. 57-58):

> "Defendant also moved the court to give to the jury the following instructions, and at the same time made to the court the following statements with reference thereto, to wit:
>
> "'(1). The court instructs the jury that it cannot in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the

carriage of interstate shipments of cross-ties. (And at the time defendant offered this instruction No. 1 it said to the court in writing: "In offering this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and the various amendments thereof, and insists that this court has no jurisdiction to consider or determine whether or not the rate on an interstate shipment is unreasonable, and if so what damage the shipper has been caused thereby, unless and until the questions of the unreasonableness of the rate and of the amount of the damage have been by court submitted to and heard and determined by the Interstate Commerce Commission.")

"'(2). The jury are instructed that they cannot allow plaintiff as damages anything on account of the fact that defendant charged to and collected from it the rate upon the 5th-class freight for the shipment of cross-ties involved in the action of Ohio Valley Tie Company *vs.* L. & N. R. R. Co. in the Jefferson Circuit Court, wherein judgment was given in favor of plaintiff and which judgment was appealed to the Court of Appeals, and which case was afterwards carried to the Supreme Court of the United States, where it is now pending. (And at the time the defendant offered this instruction No. 2, it said to the court in writing: "In moving the court to give the jury this instruction defendant relies upon the Federal Act to Regulate Commerce, approved February 4, 1887, and by amendments thereof, and insists that it is shown both by the record in the action referred to and in the present action that the shipments of cross-ties referred to in that action were interstate shipments, and that the question of the unreasonableness of the rates therein involved had never been submitted to the Interstate Commerce Commission, nor determined by it. And that this court has no jurisdiction to determine the question of the reasonableness of said rates, nor the question of the damages, if any, resulting from charging the same. And defendant also insists that plaintiff having recovered judgment on account of the charges of rates involved in that action, cannot further recover any additional sum herein, based on the same alleged wrongful acts.")'"

Nothing could show more clearly that the defendant never at any time relied or intended to rely in the trial court on the fact that plaintiff had elected to claim all its damages in the proceeding before the Interstate Commerce Commission or on the fact that damages had been awarded by the Commission and paid. This is shown not only by the fact that defendant insisted that the court could not award the damages sought in this action "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, but by the fact that the defendant did insist that the judgment recovered in the State court was a bar to the damages sought on account of the rates involved in the action in which that judgment was rendered.

This court is not concerned with the sufficiency of the evidence to support the verdict or as to whether or not the damages are excessive, but the review of the evidence in the opinion of the trial judge (Rec., p. 48) and also in the opinion of the Court of Appeals of Kentucky (Rec., p. 208) makes it clear that the acts complained of were willfully and maliciously done for the purpose of destroying plaintiff's business, and that the damages awarded were not excessive. Not only the wrongful acts alleged, but the bad motive, were either shown by undisputed testimony or virtually admitted. The admission of Milton H. Smith, president of defendant company, that the rates were purposely made and maintained at a high level in order that the ties might move out slowly, if at all (Rec., p. 155), shows the bad motive in all that was done. But without that admission the fact that defendant not only refused or delayed to furnish its own cars to move plaintiff's ties, but refused to accept the cars of other carriers when tendered for that purpose (Rec., p. 82), shows conclusively the malice found by the jury to exist. These facts are important as showing how essentially different were the wrongs complained of in this action and the damages recovered on that account from the mere taking

from plaintiff of the excess over a reasonable rate, and the claim for the return of the money thus wrongfully taken, which was asserted in the proceeding before the Interstate Commerce Commission. The essential difference between the two proceedings and the wrongs upon which they were based is further emphasized by the action of the trial court upon the first motion made by defendant in the case. By that motion the defendant sought to require the plaintiff to paragraph its petition and to state as a separate cause of action each of the willful and malicious acts alleged in the petition and the injury resulting therefrom. The trial court overruled the motion upon the ground that the various willful and malicious acts alleged, with the injury to business and property resulting therefrom, constituted jointly a single cause of action which was not severable (Rec., pp. 13-14). That action of the trial court was not relied upon as error in the Court of Appeals of Kentucky, and is not assigned as error here, although the Court of Appeals did hold that the various willful and malicious acts alleged jointly constituted a single cause of action.

An important element of damage was the injury to plaintiff's credit which resulted from the persistent effort of defendant to destroy its business, and the existence of that element of damage illustrates the futility of attempting to apportion to each of defendant's malicious acts the injury which resulted from that act.

Of the record in the proceeding before the Commission only the report and order of the Commission are a part of this record. It may be that if that record were here it would show a waiver or estoppel in addition to that shown by this record. What claims for damages may have been asserted, and denied upon the ground that the Commission did not have jurisdiction, the court does not know. The defendant gave no hint at any time during the progress of the case in the trial court that it was relying upon an election by plaintiff to claim all its damages before the Commission,

but expressly denied any right of election and thus gave plaintiff no opportunity to plead any waiver or estoppel which may have existed.

The assignments of error are twelve in number, but they may be reduced to six propositions:

(1) That it was error to award damages for the same wrongs for which the Interstate Commerce Commission had awarded damages; (2) that the court erred in holding that defendant, by failing to file a plea in abatement, waived its right to claim that plaintiff elected to demand all its damages in the proceeding before the Commission; (3) that the court erred in holding that the Jefferson Circuit Court had jurisdiction of this action in so far as plaintiff seeks to recover damages on account of a violation of the Federal Act to Regulate Commerce; (4) that the court erred in approving the refusal of the trial court to instruct the jury that it could not in this action allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates of freight for the carriage of interstate shipments of cross-ties; (5) that it was error to approve the refusal of the trial court to instruct the jury that it would have been a violation of the Federal Act to Regulate Commerce for defendant to collect less than the published rate; (6) that the approval of instructions to the jury authorizing a recovery because of defendant's refusal to permit its cars to leave its line deprived defendant of its property without due process of law.

Some of the assignments of error present no Federal question, and the other assignments are so lacking in merit that the Federal questions which they do present are frivolous.

ARGUMENT.

I.

This court will not review the judgment of a State court based upon two or more independent grounds, if any one of those grounds does not involve a Federal question, even though one of the grounds may involve such a Federal question and that question may have been decided adversely to the plaintiff in error.

Murdock *vs.* Memphis, 87 U. S., 590.
De Saussure *vs.* Gaillard, 127 U. S., 216.
Beaupre *vs.* Noyes, 138 U. S., 397.
Harrison *vs.* Morton, 171 U. S., 38.

II.

The decision of a State court that the plaintiff in error has waived a right claimed under a Federal statute either by some act or omission prior to the litigation or by failing to assert the right in the pending action at the time or in the manner prescribed by established State practice is an independent non-federal ground sufficient to support the judgment of the State court.

Brown *vs.* Massachusetts, 144 U. S., 573.
Eustis *vs.* Bolles, 150 U. S., 361.
Moran *vs.* Horsky, 178 U. S., 205.
Layton *vs.* Missouri, 187 U. S., 356.
Rogers *vs.* Jones, 214 U. S., 196, 204.
Louisville & Nashville R. Co. *vs.* Woodford, 234 U. S., 46.

III.

The decision of the State court in this case that the right claimed under the Federal statute was waived by the

failure to file a plea in abatement, which was an independent non-federal ground, was in line with the established practice both in Kentucky and in other jurisdictions.

Civil Code of Practice of Kentucky, secs. 92, 93.
Louisville & Nashville R. Co. *vs.* Louisville Bridge Co., 116 Ky., 258, 268.
Gillen *vs.* Illinois Central R. Co., 137 Ky., 375.
Stevens *vs.* Bank, 111 U. S., 197.
New Orleans *vs.* Gaines, 138 U. S., 595, 614.
Southern Pac. Co. *vs.* United States, 186 Fed., 737.
McDonald *vs.* Tison, 94 Ga., 549.
Fox *vs.* Althorp, 40 Ohio St., 322.

In Louisville & Nashville R. Co. *vs.* Louisville Bridge Co., *supra* (p. 268), the court said:

> "If objection had been made to the separation of the cause of action, the plaintiff might have dismissed one suit without prejudice, and set up the entire cause of action in the other.

IV.

Not only did defendant waive its right to claim an election by plaintiff by failing to file a plea in abatement, but it affirmatively indicated its intention not to rely upon the order of reparation as a bar by the reasons it gave for its motion to exclude testimony (Rec., pp. 176-177), and also for requesting that the jury be instructed not to consider the charging of unreasonable rates as an element of damage (Rec., pp. 57-58).

The claim that under the Act to Regulate Commerce plaintiff could not maintain the action "unless and until" the amount of the damages had been submitted by court to the Interstate Commerce Commission and determined by that tribunal, was clearly a waiver of any right to require an election or to claim that an election had been made as it

was an invitation to the court to submit the question of damages to the Interstate Commerce Commission and therefore an admission that the jurisdiction of the Commission had not been exhausted.

V.

The decision that the alleged right under a Federal statute was waived is based on a local question of pleading and practice not reviewable by this court.

Delaware City S. & P. S. B. Nav. Co. *vs.* Reybold, 142 U. S., 636.

Tripp *vs.* Santa Rosa Street Railway Co., 144 U. S., 126.

Western Union Telegraph Co. *vs.* Wilson, 213 U. S., 52.

Texas & Mo. Railway Co. *vs.* Miller, 221 U. S., 408.

Brinkmeier *vs.* Missouri Pacific Railway, 224 U. S., 268.

VI.

The provision of section 9 of the Act to Regulate Commerce which requires a shipper to elect whether he will prosecute his claim for damages for a violation of the act before the Interstate Commerce Commission or before a Federal court has no application where the shipper has a common-law right of action preserved to him by section 22 of the act which he may prosecute in a State court after the rate has been condemned by the Commission.

Texas & Pacific Ry. Co. *vs.* Abilene Cotton Oil Co., 204 U. S., 426.

Mitchell Coal Co. *vs.* Pennsylvania Railroad Co., 230 U. S., 247.

VII.

The mere filing of a claim for reparation before the Interstate Commerce Commission was not an election to claim all of plaintiff's damages before that tribunal.

Brady *vs.* Daly, 175 U. S., 148.
Rankin *vs.* Tygard, 198 Fed., 795.

That being true, the order of reparation, even if it be regarded as a judgment, is not available as a defense, not being pleaded in bar, and the record not being produced.

United States *vs.* Bliss, 172 U. S., 321.

VIII.

It would be most unreasonable to hold and it is, therefore, frivolous to contend that under section 9 of the Act to Regulate Commerce a shipper who is compelled to go to the Interstate Commerce Commission to have an unreasonable rate condemned may not accept from the Commission an order requiring the carrier to pay back to him the money wrongfully taken from him without thereby depriving himself of the right to go to the courts to recover general damages, as the courts are better prepared in all cases to give such damages, and they alone have power to give such damages where the damages have resulted from a combination of acts which together constitute a single cause of action, and the Commission has jurisdiction of only one of such acts. The Interstate Commerce Commission had refused to take jurisdiction of claims for general damages (Joynes *vs.* Pa. R. R. Co., 17 I. C. C., 361), and some of the courts had held that the courts did not have jurisdiction of a claim against the carrier for the money wrongfully taken until the Commission had ordered it to be paid back to the shipper (Darnell *vs.* Illinois Central R. R., 225 U. S., 243), and that being

true the only safe course to pursue was to go to the Commission for reparation and to the courts for general or extraordinary damages, and the plaintiff cannot be deemed, therefore, to have elected to claim all its damages before the Commission because it asked the Commission to order the repayment of the money which the carrier had wrongfully taken, there being no question of jurisdiction. Election is a matter of intention in such a case.

Madden *vs.* Louisville, N. O. & T. Ry. Co., 66 Miss., 258.

It is proper to state that a majority of the Commission as now constituted has recently held that the Commission should take jurisdiction of a claim for general damages.

Vulcan Coal & Mining Co. *vs.* I. C. R. R. Co., 33 I. C. C., 52.

IX.

As the defendant failed to ask the court, either by plea in abatement or by motion, to require the plaintiff to elect, the two remedies cannot be regarded as inconsistent, and, therefore, plaintiff had the right to prosecute both remedies, subject to the limitation that it could have but one satisfaction for the same injuries.

Barth *vs.* Loeffelholtz, 108 Wis., 562.

Here, however, the injuries are not the same, although they may arise in part from the same acts, and there was, besides, no allegation that the award made by the Commission had been satisfied.

X.

The rule that the prosecution to judgment of an action for part of an indivisible demand is a bar to an action to recover the remainder of the demand, even if there had been

a plea in abatement and the order of the Commission had been pleaded in bar, would have no application here because:

First. The demand was not an indivisible one, and that part of the demand here sued on had not accrued when the claim was filed before the Commission.

Cross *vs.* United States, 14 Wall., 479.
Deweese *vs.* Smith, 106 Fed., 438.

As the finding of the State court that the damages awarded in this action accrued after the proceeding before the Interstate Commerce Commission was instituted is not assigned as error, and being a finding of fact could not be reviewed even if it were so assigned, it must be accepted as correct, this court having no jurisdiction of questions of fact or of local law which are merely preliminary to or the possible basis of a Federal question, where no attempt to avoid the Federal question is apparent.

Henderson Bridge Co. *vs.* Henderson City, 141 U. S., 679.
Eustis *vs.* Bolles, 150 U. S. 361.
Dower *vs.* Richards, 151 U. S., 658.
Israel *vs.* Arthur, 152 U. S., 355.
Telluride Power Co. *vs.* Rio Grande Western Ry. Co., 175 U. S., 639.
Telluride Power Co. *vs.* Rio Grande Western Ry. Co., 187 U. S., 569.
Vandalia Railroad *vs.* South Bend, 207 U. S., 359.

Second. The order of the Interstate Commerce Commission was merely *prima facie* evidence and was not a judgment.

Meeker *vs.* Lehigh Valley R. R. Co., 236 U. S., 412, opinion by Mr. Justice Van Devanter, February 23, 1915.

Third. The demand upon which this action is based arose out of a combination of acts which were bound together by a common malicious purpose to injure plaintiff's business, and it is so well settled that such a combination of acts creates a cause of action separate and distinct from that created by any of the separate acts that the contention to the contrary is so lacking in merit as to be frivolous.

Standard Oil Co. *vs.* Doyle, 118 Ky., 662.
Boyce *vs.* Odell Commission Co., 107 Fed., 58.
Jones *vs.* Morrison (Minn.), 16 N. W., 854.
Oliver *vs.* Perkins, 92 Mich., 304.

Fourth. The purpose of the proceeding before the Commission was, in effect, to recover that which had been wrongfully taken, while this action was brought to recover damages resulting from that wrongful taking in connection with other acts, and therefore the two claims were so different in their nature that the recovery of the one kind of damages was not a bar to the recovery of the other kind. And this would be true even if the willful and malicious maintenance of the rates were the only ground of action.

Analogous authorities:

Walker *vs.* Mitchell, 18 B. Mon., 541.
Woods *vs.* Finnell, 13 Bush. (Ky.), 628.
Bramlette *vs.* Louisville & Nashville R. Co., 113 Ky., 300.
Bramlette *vs.* Louisville & Nashville R. Co., 24 Ky. Law Rep., 976.
Louisville Gas Co. *vs.* Ky. Heating Co., 132 Ky., 435.
Crockett *vs.* Miller, 112 Fed., 729.
Hensen *vs.* Taylor, 108 Ga., 367.

XI.

Even if the court might hold, without a plea in abatement or a plea in bar, that there was an election by plaintiff to claim all its damages in the proceeding before the Commis-

sion, if all the record in that proceeding were here, there is no merit in the claim that it may do so in the absence of the record, as that record might show some element of waiver or estoppel.

United States *vs.* Bliss, 172 U. S., 321.
Jourolman *vs.* Massengill, 86 Tenn., 81.

It does affirmatively appear that plaintiff asked the Commission to award to it the difference in the two rates, and there is no room for the assumption that it asked general or consequential damages. In this case the court expressly instructed the jury not to find for plaintiff anything on account of the difference between the rate charged and the rate found to be reasonable (Rec., p. 60).

XII.

The first, second and third assignments of error are based upon the assumption that the State court decided that the wrongs for which a recovery was permitted in this case are the same wrongs on account of which reparation was awarded by the Interstate Commerce Commission, whereas the court decided that the wrongs were not the same, and that decision, not being assigned as error, cannot be reviewed.

XIII.

The claim made by the eighth assignment of error that the Jefferson Circuit Court had no jurisdiction of this action is wholly without merit, because:

First. No objection to the jurisdiction was ever made except by the second paragraph of the special demurrer to the original petition, and that objection was based solely on the ground that the Interstate Commerce Commission alone had jurisdiction to the extent that the claim for damages was based on the charging of unreasonable rates by defendant. Besides, the objection was sustained upon the ground that the Commission must first find the rates to be unreasonable

before a right of action could be based on the fact that they were willfully and maliciously published,. and was not renewed after the amended petition was filed setting up the fact that the rates had been condemned by the Interstate Commerce Commission. The State court had jurisdiction of the subject-matter under section 16 of the Act to Regulate Commerce, even though the action be regarded as one for a violation of that act, and any right to object to the jurisdiction merely because the Interstate Commerce Commission had not ascertained the damages was waived by failure to make the objection at the proper time.

Darnell *vs.* Illinois Central R. R., 225 U. S., 243.

Second. The question was not decided by the State Court.

Third. The action was a common-law action, and, as all common-law remedies were preserved by section 22, the State court had jurisdiction notwithstanding section 9 and without the aid of section 16.

Texas & Pacific Ry. Co. *vs.* Abilene Cotton Oil Co., 204 U. S., 426.

Robinson *vs.* Baltimore & Ohio R. Co., 222 U. S., 506.

Each of the cases cited was an action brought in a State court, and the only reason that court was denied jurisdiction was that the Interstate Commerce Commission had not condemned the rate or the practice complained of.

Fourth. The State courts have jurisdiction of actions for violations of Federal statutes unless the statute provides otherwise.

Western Union Tel. Co. *vs.* Call Publishing Co., 181 U. S., 92, 102.

Missouri Pac. Ry. Co. *vs.* Larabee Flour Mills Co., 211 U. S., 612.

Galveston, H. & S. A. Ry. Co. *vs.* Wallace, 223 U. S., 481.

Missouri, K. & T. R. Co. *vs.* Harris, 234 U. S., 415.

Fifth. The declaration by defendant in requesting instructions that the court itself should ask the Commission to ascertain the damages (Rec., pp. 58-59) was an admission of jurisdiction.

XIV.

The ninth assignment of error to the effect that the State court erred in approving the refusal of an instruction to the jury not to allow any damages to plaintiff on account of defendant having charged to and collected from plaintiff unreasonable rates has no merit, because:

First. The only Federal question which the assignment presents is that which was declared when the instruction was offered (Rec., pp. 57-58), and that is based upon the ground that the court had no jurisdiction under the Act to Regulate Commerce to consider or determine what damage the shipper had suffered from the charging of an unreasonable rate "unless and until" the amount of the damage had been submitted by court to and determined by the Interstate Commerce Commission, which contention was abandoned in the Court of Appeals of Kentucky by the substitution therefor of the contention that defendant was entitled to the instruction because plaintiff had no right to go to either the Commission or the courts for additional damages on account of the charging of unreasonable rates. The ground on which this instruction was asked being abandoned in the Court of Appeals, the Federal question involved was never presented to or decided by that court, and cannot, therefore, be reviewed by this court.

Second. In the absence of any express decision of the question by the State court, it must be assumed that the court concluded, as it had the right to do, that the question had been abandoned or that the court was of opinion that the objection came too late, no motion having been made to

strike from the petition the allegations relating to the charging of unreasonable rates and no objection having been made to the testimony offered on that subject.

Cox *vs.* Texas, 202 U. S., 446.

Third. The mere condemnation of the rates by the Commission was sufficient to authorize the consideration of the willful and malicious maintenance and charging of the rates as an element of damage.

Mitchell Coal Co. *vs.* Pennsylvania R. Co., 230 U. S., 247.

Phillips Co. *vs.* Grand Trunk Western Ry. Co., opinion by Mr. Justice Lamar, March 15, 1915.

Fourth. In no event did the court have authority to submit any question to the Interstate Commerce Commission.

XV.

As the questions raised by the 10th, 11th and 12th assignments of error were neither presented to the State court nor referred to by that court in its opinion, it must be assumed that the court found that the alleged errors, if any, in giving and refusing instructions were not prejudicial or that the alleged errors were not properly presented for review.

Cox *vs.* Texas, 202 U. S., 446.

Under a State practice like that of Kentucky, which authorizes a reversal only for errors prejudicial to the substantial rights of the party appealing (Civil Code of Practice, secs. 134, 338, 756), it would be unreasonable to require this court in an action involving many elements of damage to scan the record closely to ascertain whether or not an error in giving or refusing an instruction relating to only one of these elements of damage was prejudicial where the plaintiff in error failed to present the question to the State court, and it was not decided by that court.

Besides, the defendant by its petition for rehearing under the caption "The Federal Question" referred to the question of election of remedies alone, thus showing that it did not intend to rely on any other Federal question.

XVI.

The claim that the court erred in approving the refusal of the trial court to instruct the jury that it would have been a violation of the Act to Regulate Commerce for defendant to collect less than the published tariff rates is so lacking in merit as to be frivolous in view of the fact that defendant could not profit by its own wrong in publishing the rates willfully and maliciously knowing them to be unreasonable. Defendant knew when it published the tariff naming those rates that it could not, while that tariff remained in effect, be prohibited from collecting the rates named therein, and as it maliciously intended to inflict whatever injury might result from that fact, and thus abused the process granted by the statute for the collection of rates, it cannot rely upon that fact as exempting it from liability.

Analogous authority:

Woods *vs.* Finnell, 13 Bush. (Ky.), 628.

XVII.

The trial court did not instruct the jury that any duty rested upon defendant to permit its cars to go off its line, but merely that defendant had no right to willfully and maliciously discriminate against plaintiff in that respect, and that this did not operate as a taking of property without due process of law is so well settled that the questions raised by the 11th and 12th assignments of error must be regarded as frivolous.

Missouri Pacific Ry. Co. *vs.* Larabee Flour Mills Co., 211 U. S., 612.

Pennsylvania Company *vs.* United States, 236 U. S., 351, opinion by Mr. Justice Day, February 23, 1915.

XVIII.

As plaintiff's right of action is not based on a Federal statute, the questions presented do not involve the right of defendant to be shielded from liability under such a statute, although the questions may incidentally involve the construction of such a statute. Therefore, this court has no power to consider the questions, as the case comes here from a State court.

Kizer *vs.* Texarkana & Fort Smith Ry. Co., 179 U. S., 199.

St. Louis & Iron Mountain Ry. Co. *vs.* McWhirter, 229 U. S., 265, 275.

Seaboard Air Line Ry. *vs.* Duvall, 225 U. S., 477.

Seaboard Air Line Ry. *vs.* Padgett, 236 U. S.—decided March 22, 1915.

Conclusion.

We submit that the assignment of errors does not raise a single Federal question which has any merit whatever, and that, without regard to whether or not the questions were waived by the failure to present them in the trial court at the proper time and in the proper way, the writ of error must be dismissed or the judgment affirmed because the questions are frivolous.

Respectfully submitted,

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